Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment by	)	WT Docket No. 17-79
Removing Barriers to Infrastructure Investment	)	

COMMENTS OF THE CITY OF NEW YORK

The City of New York ('the City') submits these comments in response to the Notice of Proposed Rulemaking and Notice of Inquiry in the above-captioned proceeding, which was released by the Commission on April 21, 2017 (the "NPRM/NOI").

I. Introduction

The Commission seeks comment on its proposed efforts to streamline state and local review of network infrastructure. In an effort to encourage the deployment of next generation wireless broadband infrastructure, the Commission raises the possibility of imposing nationwide rules on diverse states, cities, and towns that would not only significantly distort the market and greatly reduce the power of local governments to manage their rights-of-way for the betterment of their citizens, but would step beyond the bounds of the Commission's authority under 47 U.S.C. §§ 253 and 332.

The issues regarding which the Commission seeks to preempt state and local rules — including, but not limited to, fees for access to the rights-of-way and to specific structures, time to act on applications, and aesthetic issues—are of extreme importance to states and localities. They directly affect the ability of state and local governments to manage their rights-of-way for use by all their citizens. Additionally, the decisions that states and localities make on these issues are heavily influenced by the resources they have available, and new regulations by the Commission will not change those realities.

The City will focus in these comments first on the absence of Commission legal authority to preempt or otherwise limit local government decision-making with respect to the placement of antennas and other wireless facilities on property the local government owns or controls, including public rights-of-way. Recent public statements by several Commissioners suggest that, indeed, even before this NPRM/NOI was issued, certain policy determinations have already been pre-judged. These comments will discuss the policy issues raised, but it is important first to keep in mind that no matter how important the Commission may view a policy, if the Commission lacks the statutory legal authority to pursue such policy, then the Commission's recourse is to make recommendations for statutory changes to Congress, not to act beyond its authority.

II. Legal Authority

A. The NPRM/NOI's Discussion of the Commission's Preemption Authority

The NPRM/NOI at paragraphs 95 and 96 asks questions and raises issues about the Commission's authority to preempt local regulations or decisions. At paragraph 95, the NPRM/NOI sets out a useful description of the differing relevant language used in Section 253(a) ("statute," "regulation" or "other legal requirement"), 332(c)(7)(A) ("decisions") and 332(c)(7)(B)(i) ("regulatory"). But then the NPRM/NOI jumps to a Commission "belief"[1] that is unsupported, and indeed directly contradicted, by the very language distinctions it has just identified. How is it that Congress's use in the 1996 Telecommunications Act of the additional concept of "other legal requirement" in 253(a), but *not* in 332(c)(7)(B)(i), somehow communicates to the Commission that Congress meant the same thing in both provisions? The Commission fails to explain any basis for a "belief" that Congress clearly expressed its intention to accomplish the same thing in two provisions, adopted as part of the same legislation, one that includes broadening language ("other legal requirements") and the other that does not. If the Commission is suggesting that by using the broad term "decisions" in 332(c)(7)(A), Congress has given the Commission room for its belief, that would be a deeply mistaken approach. The "decisions" language is in a provision that grants states and local governments *protection from preemption* (332(c)(7)(A)), while the limited "regulatory" language is in the preemptive language (in 332(c)(7)(B)(i)). These language placements not only fail to support the Commission's "belief," they directly contradict any such belief.[2]

In paragraph 96 of the NPRM/NOI, the Commission asks: "Should a distinction between regulatory and proprietary be drawn on the basis of whether State or local actions advance those government entities' interests as participants in a particular sphere of economic activity (proprietary), by contrast with their interests in overseeing the use of public resources (regulatory)?" It is not clear how the Commission could ever coherently parse such a dividing line in the context of a local government property owner. Private property owners from whom wireless providers might seek site locations could have a wide range of motives in deciding whether or not to allow access to their property, some of them quite subjective (such as the aesthetic effect on the property) but such motives do not change the private owner's role or status to anything other than proprietary. Indeed, the kind of distinction that the Commission seems to be suggesting here would likely as not cut against the policy interests the Commission has expressed it seeks to support. Thus, a local government may seek to maximize the rent it obtains for access to the properties it owns, if it were restricted to some narrow definition of its proprietary interest as a property owner, or may prefer to moderate its rental requirements in an effort to support access to wireless services. To conclude that the former would be exempt from preemption by its nature as narrowly "proprietary," but the latter is not within the scope of the government's activity as property owner and thus subject

[1] "We believe there is a reasonable basis for concluding that the same broad interpretation [of Section 253] should apply to the language of Section 332, and we seek comment on this analysis.

[2] Perhaps the Commission is looking to the use of the word "decision" in 332(c)(7)(B)*(iii),* but that subsection is merely procedural, provides no separate basis for preemption, and covers only a very limited class of decisions, decisions "to deny" wireless facilities requests. Any other wireless siting decisions that a local government makes in relation to property it owns – such as decisions regarding the amount of rent to be charged, types of government-owned properties on which wireless facility installation will be accepted, aesthetic, size and engineering standards to be applied, etc. – are protected from preemption under 332(c)(7)(A) and are subject neither to preemption under 332(c)(7)(B)(i) nor to the procedural requirements of 332(c)(7)(B)(iii).

to preemption under 332(c)(7)(B)(i) would be both paradoxical as a policy matter and unsupported by any reasonable view of what property ownership entails.

Congress in the 1996 Telecommunications Act ("TCA") did expressly give the Commission broad authority to regulate the siting of certain communications equipment in a manner that would even trump the authority of property owners over their own property. But in doing so it carefully and in detail limited the scope of that authority to prohibit restrictions that "impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services." Telecommunications Act of 1996, Section 207 (codified as a note to 47 U.S.C. Section 303, and implemented by the Commission in its "OTARD rule" at 47 CFR 1,4000). Congress in the TCA knew very well how to expressly grant the Commission authority to ensure that property owners did not prevent the siting of devices that enable communications services and did just that in Section 207. But it also knew exactly the devices and services regarding which it was prepared to grant such authority to the Commission, and it limited those to reception devices for broadcast, satellite and MMDS video, not wireless transmission and other facilities that are the subject of the NPRM/NOI. For the Commission now to claim that it has been granted the express authority to override local government property ownership authority would be inconsistent with Section 207's limits on such authority.

With respect to both rights-of-way and to the "municipally-owned lampposts . . . or utility conduits" that the NPRM/NOI refers to in paragraph 96, the authority of local governments as owners of such properties is not subject to preemption with respect to wireless siting not only for all of the reasons described above, but also based on reference to 47 U.S.C. Section 224 (the "Pole Attachment Act"), which authorizes the Commission to promulgate rules regarding "pole attachments" by telecommunications service providers "to a pole, duct, conduit, or right-of-way owned or controlled by a utility"– but the statute expressly *excludes* States and local governments from the definition of a utility, yet another indication that the Commission is not authorized to engage in mandating the attachment of wireless communications equipment to local government-owned poles or rights-of-way.

B. Potential Sources of Express Preemption

Neither of the provisions the Commission cites as bestowing preemption authority offer a "clear statement" of such authority with respect to local government decision-making regarding wireless facilities placement on public rights-of-way. To the contrary, these provisions evince in clear and plain language Congress's intent to insulate entirely such local decision-making from preemption.

1. 253(a) and wireless facilities siting preemption

To understand 253(a)'s role in this respect, it is necessary first to look at subsection (A) of 332(c)(7): "Except as provided in this paragraph, ***nothing in this chapter*** shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities. [emphasis added]." "Nothing in this chapter" refers to all of Chapter 5 of Title 47 (Sections 151 through 622). Thus 253(a) cannot "limit or effect the authority of . . . a local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities." A local government's decisions regarding whether to allow wireless facilities on its streets, its decisions regarding the terms and conditions it will apply to any

such installations it chooses to allow, its decisions regarding the entities it will allow to install such installations, its decisions regarding the amount of rent it will charge for the right to install and maintain such installations on city-owned property – all these decisions are matters that are not limited or affected by 253(a), pursuant to the plain, unambiguous meaning of Section 332(c)(7)(A).[3] As stated in *Sprint Spectrum v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002)("*Mills*"):

> The structure of § 332(c)'s paragraph (7) indicates that Congress meant preemption to be narrow and preservation of local governmental rights to be broad, for subparagraph (A) states that "*nothing*" in the FCA is to "limit or affect" local governmental decisions "*except* as provided in this paragraph." 47 U.S.C. § 332(c)(7)(A) (emphases added). Thus, unless a limitation is provided in § 332(c)(7), we must infer that Congress's intent to preempt did not extend so far.

Applying the unambiguous language of 332(c)(7)(A) renders futile any reference to 253(a) as a basis for preemption of any local decisions regarding antenna placement, a result that is entirely consistent with the legislative intent underlying the 1996 Telecommunications Act.

Nothing in the legislative history of TCA Section 253 suggests the slightest hint that Congress believed it was covering wireless facilities placement, or indeed wireless service at all, in Section 253; that subject was reserved for Section 332. Indeed, subsection (e) of Section 253 expressly defers back to Section 332(c)(3) in connection with wireless service.[4]

Section 253 was structured and adopted in an environment in which Congress assumed that competition in local telephone markets would develop primarily via sharing by regional Bell Operating Companies ("RBOCs") with competitors of existing facilities.[5] Existing cable capacity, and existing duct space and utility company poles (where some new, additional cabling could be easily lashed) would become available to competitors as needed, limiting new demands on public property and the public streetscape and avoiding the need to confront issues of how to allocate limited public space to new entrants.[6] 253(a) preempts state and local governments from re-creating the very monopoly provision of local phone service that other sections of the TCA sought to end, but given the assumptions of the time, Section 253 never wrestled with the issues that would be raised if forms of service provision arose that required hard choices about who gets access at what price and on what terms to public property and resources that are limited, and where installation of communications facilities could have a direct and potentially adverse impact on the public's own uses of such property and resources. In short, to try to import 253(a) preemption into an area -- wireless facilities location on public property -- where it was never intended to belong, and where it obviously

[3] The primary definition of "decision," according to Merriam-Webster's dictionary web site is "a: the act or process of deciding; b: a determination arrived at after consideration." *Decision*, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/decision.

[4] The preemption described in 332(c)(3), like that in 253(a), is foreclosed from applying to wireless facilities siting decisions by 332(c)(7)(A). As a result, 332(c)(3) would preempt only something like a broad ban on the provision of wireless service generally in a state or locality, not on matters relating to facilities siting, which are the exclusive province of 332(c)(7).

[5] The RBOCs were to be enticed to share such facilities by the opportunity to enter the long-distance market that had been barred to them and from which they would continue to be barred unless they agreed to share such existing facilities.

[6] It was a widely held assumption at the time that extensive new, competitive installation of last-mile facilities was impractical and uneconomic in most areas.

does not fit, is to try to hijack a square peg that cannot fit in a round hole. The plain, unambiguous language of 332(c)(7)(A) limits preemption of all decisions regarding wireless facilities siting to only the provisions of 332(c)(7) itself, incorporating and reflecting the understanding and intention of Congress as to the limited scope of 253(a).

Note also in this connection that Section 6409 of the Spectrum Act (47 U.S.C. Section 1455) expressly takes precedence over Section 332(c)(7)(A)'s protection from preemption, but does not reference Section 253(c)'s protection from preemption. This distinction makes sense in light of the understanding that neither 6409's mandated zoning and land use approval of certain collocations, nor 332(c)(7)(B)(i)'s limitations on local zoning and land use regulations, cover decisions involving wireless facilities placement on public-rights-of-way or other properties that are government-owned operated or managed, and of the understanding that Section 253, which does implicate "legal requirements" if they apply to public rights-of-way, was never intended to, and does not, cover wireless antenna siting. Congress targeted 6409 and 332(c)(7) specifically to zoning and land use regulatory activity regarding wireless facility placement on private property, while 253 is targeted specifically to wireline facilities and their traditional location in public rights-of-way.

2. 332(c)(7) and wireless facilities siting preemption.

Of the five subsections of 332(c)(7)(B), (i) through (v), the preemptive subsections are (B)(i) and (B)(iv).[7] The language of these two sections, distinctively worded in contrast to 332(c)(7)(A), makes unambiguously clear that Congress did not intend to limit the scope or substance of local government decisions regarding wireless facilities placement on publicly owned property, such as public rights-of-way. As noted above, 332(c)(7)(A) protects from preemption all "decisions" regarding wireless facilities placement unless expressly preempted in subsequent subsections. Subsection (B)(i) provides for certain preemptions, but only with respect to "regulation" of facilities placement, construction and modifications. The use of the general term "decisions" in (A) is dropped here and replaced by "regulation." To any argument that this replacement is merely accidental or arbitrary, note that the word "decision" is not forgotten, but rather is picked up again in a subsequent subsection, just not in the preemptive subsections. The use of the narrower term "regulation" in (B)(i) (as compared to the general term "decisions" in (A)) represents a limitation on the scope of 332(c)(7)(B) preemption, limiting such preemption to local governments acting in a regulatory context as opposed to a proprietary context. Proprietary "decisions" are thus not preempted by 332(c)(7)(B)(i), whether under clause (I) ("shall not unreasonably discriminate . . . ") or (II) ("shall not prohibit or effectively prohibit . . .). As the court in *Mills*, 283 F.3d at 420 (2d Cir. 2002) explained:[8]

> Further, the language of paragraph (7) suggests that Congress did not mean to eliminate the distinction between acts that are regulatory and those that are proprietary, for the language in subparagraph (7)(A), preserving to local governmental entities authority except as limited in paragraph (7), refers broadly to governmental "decisions," whereas the prohibition set out in subparagraph (B)(iv) refers only to regulations. The latter states the limitation that, to the extent that a facility complies with FCC standards governing RF emissions, "no State or

[7] (B)(ii) and (iii) impose procedural requirements on local governments but do not create any substantive preemption; (B)(v) is a jurisdictional provision.

[8] Although *Mills* refers to (B)(iv), the identical analysis is applicable to (B)(i) – the "regulate"/"regulation" terminology is used in both, and the contrast to the broader "decision" language in (A) applies to both.

> local government or instrumentality thereof may *regulate*" facility construction, placement, or modification. *47 U.S.C. § 332(c)(7)(B)(iv)* (emphasis added). The contrasting terms used in (A) and (B)(iv) reveal that the preemption provision with respect to RF emissions expressly provided by Congress in (B)(iv) carves out of subparagraph (A) only such decisions as constitute "regulation." Thus, the language and structure of the TCA implicitly recognize that some governmental decisions are not regulatory and reveal that Congress meant "nothing" in the FCA to limit or affect the authority of a governmental entity "over decisions" as to the construction, placement, or modification of personal wireless service facilities on the basis of RF emissions "except" to the extent that those decisions constitute "regulation."

What is a "proprietary," as opposed to a "regulatory" decision in this context? The answer in the context of government-owned property on which wireless facilities siting is sought is straightforward. When a wireless provider seeks to install a wireless facility on a property it does not itself own, it must first receive the permission of the owner[9] of the property, including meeting all terms that the owner requires be met as a condition of such installation. The terms an owner might require be met as conditions of a wireless facilities installation could include, without limitation, rent requirements, size and other physical limitations, aesthetic requirements, safety requirements, and many other terms and conditions. Indeed, a private owner may well consider, in its deliberations as to whether and on what terms to allow a wireless facilities installation on the owner's property, how highly the owner values the service that the wireless installation would provide, for example to other occupants at the same property, or other of the owner's properties in the area, or to other businesses or activities in which the owner is involved. Any and all of these matters may go into a property owner's consideration of whether and on what terms to grant a wireless provider access to the owner's property for a wireless facilities installation. As a separate matter, zoning and land use regulations in the applicable community may impose limitations on the use of the applicable property that would not allow the proposed installation even if the owner is willing to allow it and even if the owner and wireless provider have agreed on terms between them. In this context, if a local government is itself the owner of the property on which a wireless installation is sought, then all of the decisions that any owner may make and all of the matters any owner may take into account in its decision-making by definition fall into the category of the proprietary role undertaken by the local government.

The Commission suggested[10] that if the site a local government owns constitutes, or is located in, on or over, public rights-of-way, that status somehow renders "regulatory" local government decisions that would otherwise be proprietary. Again, that is an unsupportable distinction. The U.S. Supreme Court direction has long been (*St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893)) that with respect to federal preemption for communications franchise purposes, the property ownership rights of a state or local government in the public rights-of-way are to be treated in the same way as such rights with respect to a city hall or state house building, or indeed as a private owner of an individual

[9] The use of the word "owner" here is intended to include a tenant that pursuant to its leasehold controls this particular aspect of use of the property and to include a manager authorized by the owner or applicable tenant to grant rights to use the property for this purpose.

[10] See the NPR/NOI at paragraph 96: "How should the line be drawn in the context of properties such as public rights of way (*e.g.*, highways and city streets), municipally-owned lampposts or water towers, or utility conduits?"

private property. The Court in *St. Louis v. Western Union* explained that the fact that a state or local government owns its streets or highways subject to the rights of members of the public to pass temporarily along such property to get where they are going, does not vitiate the proprietary rights of such government owner vis-à-vis those who seek to install communications facilities in or on such rights-of-way, and the Court in that case opined specifically that such state or local government ownership rights in the rights-of-way were to be treated no differently than their ownership rights in a non-right-of-way property such as a city hall or state house.

The Court's treatment in *St. Louis v. Western Union* accords with common sense. With respect to a private property where a wireless provider seeks to install a wireless facility, the proprietary rights are exercised by the private owner, whose proprietary decision to accept such installation (including decisions regarding the terms and conditions of such acceptance) is a prerequisite, separate and apart from any required compliance with applicable zoning/land use regulation, to such installation. In the right-of-way context, the proprietary decision-making role in the owner/wireless provider/land use regulator triumvirate is exercised by the local government as owner of the rights-of-way, again separate and apart from the question of compliance with local government zoning and land use regulation. Such proprietary decision-making role is *not* subject to preemption under 332(c)(7)(B)(i)(I) or (II), restricted as those clauses are to *regulation* of placement of wireless facilities.[11]

One district court has opined (in the Section 253 context, not the 332(c)(7) context) that a local government's decision-making is rendered "regulatory" rather than "proprietary" merely because the local government included among the factors in its decision-making an interest in promoting wireless service by encouraging wireless facilities siting.[12] But that theory lacks logical support (and in the particular case was rendered moot by the same court's conclusion that the plaintiff had failed to show a 253(a) prohibition or effective prohibition[13]). A private owner may choose to rent land to a wireless provider for a tower at a lower rent than the owner might otherwise obtain for another purpose because the owner has many other properties in the area whose value will be enhanced by the presence of wireless service in the area, or because the owner has investments in the wireless industry, or because the owner's mother-in-law lives in the area and wants better wireless service. Such additional motives or goals of the property owner do not render the owner's decision to rent or not rent the site for wireless facility installation any less of a proprietary decision, and certainly do not run contrary to any overall federal scheme to promote the availability of telecommunications services, to the contrary, such motives would support such federal scheme.

In any event, the proprietary nature of a decision regarding wireless siting on publicly-owned property under 332(c)(7)(B)(i) goes not to the goals or motives that factor into the decision

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[11] Section 253(a)'s preemptive effect on rights-of-way decisions is not similarly restricted, because, unlike 332(c)(7)(B)(i), 253(a) refers not merely to statutes and regulations but also "legal requirements." That is why Congress expressly incorporated a circumscribed set of protections from preemption in Section 253 for certain forms of local government activity with respect to rights-of-way, i.e., in 253(c). The fact that Congress did not include a protection from preemption parallel to 253(c) for local rights-of-way decisions with respect to 332(c)(7)(B)(i) confirms that Congress did not intend that 332(c)(7)(B)(i) preempt local government public rights-of-way decisions, as they are ownership decisions, not "regulation."

[12] NextG Networks of New York v. City New York, 2004 U.S. Dist. LEXIS 25063 (S.D.N.Y. Dec. 10, 2004).

[13] NextG Networks of New York v. City New York, 2006 U.S. Dist. LEXIS 8597 (S.D.N.Y., Mar. 6, 2006), affirmed in part, reversed in part, and remanded by NextG Networks of NY, Inc. v. City of New York, 513 F.3d 49 (2d Cir. N.Y., Jan. 15, 2008).

but rather to the origin of the authority that empowers such decision. If the entity's authority arises based on property ownership, management or control, the decision is proprietary in the sense that the local government is acting in the capacity of the private owner in the wireless siting relationship of wireless provider/site owner/land use regulator. If the entity does not own, control or manage the property but instead has authority that derives only from its status as a government regulator of zoning or land use in the community at large, the decision is not proprietary. The City of New York has a long history of pioneering and encouraging the use of sites on the public rights-of-way that it owns for the location of wireless facilities. It may try to accommodate such location requests on terms it might not accept for other potential uses of the same locations, in light of the interests of the City's citizens, businesses, and visitors in fast, reliable, and accessible wireless services. But that broad interest does not transform the City's decision-making regarding wireless facilities siting on properties it owns from a proprietary decision to "regulation." The City of course does also have regulations regarding zoning and land use with which any private property owner must comply if it decides to allow a wireless installation on its private property. It is these regulations that could be subject to preemption under 332(c)(7)(B)(i). In contrast, the City's decision-making regarding the siting of wireless facilities on City property (whether it be our City Hall or our sanitation truck parking garages, or our streets and sidewalks (which the City own as what our City Charter refers to as "inalienable property of the City to be made available for private occupancy only by franchise, concession or revocable consent), or the street light poles, traffic light poles and other structures or equipment that the City installs on those streets and sidewalks) is by its nature proprietary, not regulation subject to preemption under 332(c)(7)(B)(i).

C. Limits on the Commission's Jurisdictional and Procedural Authority, Even if It Had Substantive Preemption Authority Under Section 253

In the City's recent filing in WT Docket No. 16-421,[14] the City discussed jurisdictional and procedural constraints that would limit the scope of any Commission action with respect to preemption on wireless facilities siting under Section 253, even if, *arguendo*, such authority existed. Those points are reiterated below.

The City observes that any attempt by the Commission to issue binding determinations pursuant to 47 U.S.C. Section 253 that would preempt local management of rights-of-way authority, including matters related to the placement of small cells on poles located in such right-of-way, would be beyond the scope of the Commission's statutory authority.

First, Section 253(d), which is the statutory basis for the Commission's preemption authority under Section 253, authorizes only case-by-case action, not action by general rule because it authorizes preemption only to the extent necessary to correct the applicable violation or inconsistency.

The City's experience provides a useful example in this respect. In New York City, Mobilitie in 2007 first acquired, from the original franchisee, the franchisee's rights to one of our existing poletop franchises, presumably concluding that its terms would not be prohibitive or effectively prohibitive. Under this franchise, Mobilitie pays the City over $100,000 a year as a base amount, and in addition is renting over eight hundred pole locations, including several

[14] City of New York, Comment in the matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling, WT Docket No. 16-421 (March 8, 2017).

hundred of them with a recurring fee of over $2,700 per pole per year. Then, just last year, Mobilitie acquired the franchisee's rights to yet a second City poletop franchise, giving Mobilitie access to yet additional poles. And this year, Mobilitie notified the City that it would be exercising its option under this second franchise to expand the area where it will be permitted to access poles, to an area where the recurring per pole fee will be over $3,000 per year, in addition to an increase in the base amount it will pay. None of these actions seem consistent with a position that the City's franchise terms are prohibiting or effectively prohibiting Mobilitie or its clientele from providing service in the City (particularly given that the City's poletop franchise system is applicable to all City poletop antenna users, both Mobilitie and its competitors, and thus certainly cannot be said to inhibit or limit "the ability of any competitor or potential competitor to compete in a fair and balanced" environment). Indeed, Mobilitie seems to be interested in obtaining the rights to an increasing number of poles on the compensation rates, terms and conditions in the existing franchises, including compensation rates that are not based on "costs," are recurring, and include both a base rate and a per-pole-rate. If the Commission were, as Mobilitie has requested in its recent petition, to issue a declaratory ruling that would have the effect of preempting the City's compensation rate terms, such would directly contradict Section 253(d)'s requirement that Commission preemption be limited "to the extent necessary to correct" a "violation or inconsistency."

Secondly, it is not a coincidence that despite many lawsuits regarding the scope of 47 U.S.C. Section 253 that have arisen over the past twenty years (though more in the early years after the 1996 Act), the Commission has never acted conclusively on any Section 253 matter implicating local rights-of-way management or compensation. Section 253(d) conspicuously omits Section 253(c) from its description of matters that are subject of Commission preemption, and the legislative history is abundantly clear that Congress intended that the courts, and not the Commission, have jurisdiction over matters implicating local management of rights-of-way. For the Commission to rule on what constitutes "fair and reasonable compensation" under Section 253(c), or otherwise determine the scope of Section 253(c), would be for the Commission to act squarely beyond the limits of its legislative authority as expressed in Section 253(d), limits that the Commission has understood and respected for many years.

D. No Implied Preemption

Congress made it clear that the TCA was not to be a source of implied preemption of any state or local laws. See Section 601(c)(1) of the TCA: "No implied effect: This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." (codified as a note to 47 U.S.C. Section 152). Such a requirement that preemption be express is reinforced and amplified by the "clear statement" rule that was articulated by the U.S. Supreme Court in *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("*Gregory*"), applied in the TCA context in *Nixon v. Missouri Municipal League* 541 U.S. 125 (2004) and *State of Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016), the latter of which cited Commissioner, now Chairman, Pai's own favorable reference to the "clear statement" rule in his dissent from the Commission's Memorandum Opinion and Order in *In re City of Wilson*, 30 FCC Rcd 2408 at 2507. The "clear statement" rule articulated in *Gregory* provides that if Congress intends to preempt a power traditionally exercised at the state or local level, "it must make its intention to do so 'unmistakably clear in the language of the statute.'" (*Gregory*, 501 U.S. at 460). Ownership and control of local streets, including decisions as to their

occupation by private entities for profit-making purposes and the price to be charged for such use is indisputably a power traditionally exercised at the state and local, rather than the federal level of government. See for example, *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893), *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999). In short, the "clear statement" rule must be applied on issues of preemption of local government decisions regarding the use and occupation of local public rights-of-way, reinforcing the bar to implied preemption in Section 601(c)(1) of the TCA.

III. Policy Considerations

A. Introduction

The preceding pages have analyzed the limits on the Commission's legal authority to preempt local government choices with respect to wireless facilities siting on local government-owned, controlled or managed property, including streets and sidewalks and other public rights-of-way. This section will discuss some of the practical and policy reasons that the Commission should not, even if it could, seek to preempt such local government choices. The City has previously discussed many of these matters in its comments submitted in WT Docket No. 16-421, although if anything the policy concerns have grown even deeper since those comments were submitted.

When the City began, more than twenty years ago, granting franchises allowing franchisees to attach wireless service equipment to City street light and other poles, the City commenced a now long-standing effort to support the availability of wireless services in our community with the resources it owns in the public rights-of-way. The City also seeks to assure it is fairly compensated for the private, profit-making occupancy of or on what is, pursuant to the City's Charter, the inalienable property of the City, and that its other interests – including without limitation its operational and aesthetic interests in the City property being occupied - are well-protected. The Commission's suggestions that it may now take action to intervene in local government decision-making with respect to wireless facilities siting puts these long-standing City efforts at risk.

In its Public Notice issued in WT Docket No. 16-431 ("the Notice"),[15] the Commission highlighted New York City's existing franchise system for installation of small cell/DAS facilities, a system the City has had in place now for over twelve years, with eight current franchises and over 2,480 small cell/DAS facilities installed on poles in the City's streets. The Notice recognized the City's poletop franchise system as featuring a "relatively low fee structure and a streamlined process for review of small wireless facility applications" on streetlight poles, traffic light poles, and utility poles located in the public rights-of-way. The Notice acknowledged the City's poletop franchise approach as a form of master agreement for access to structures in the public rights-of-way that expedites the attachment of small cell wireless facilities to city-owned infrastructure. The City appreciated the Commission's recognition in the Notice of the City's approach as one that appears to be viewed as a successful effort to manage the complex balance that the Commission identifies in facilitating the availability of robust wireless service while also assuring that vital local interests are protected. We hope the Commission will recognize the City's comments below as arising from

[15] Public Notice, *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Federal Communications Commission, WT Docket No. 16-421 (rel. Dec. 22, 2016).

the City's extensive and successful experience working with a broad range of wireless facilities providers over many years in this arena.

B. The City's Poletop Franchises

The Notice correctly identified the City's mechanism for authorizing and managing small cell facility installations in local rights-of-way as a set of franchise contracts entered into with various wireless facilities and service providers. These franchise agreements, eight of which are currently active, have been carefully drafted and negotiated with providers to ensure that critical public concerns are protected. Important public priorities that the City's poletop franchises protect include the following:

1. Compatibility with the City's operational needs regarding the street lighting and traffic light activities that represent the primary intended use of the City's poles.

Street light poles and traffic light poles were built to provide street lighting and traffic control, and the priority of those purposes must be preserved and protected. Wireless users under the City's franchises are required to operate on City poles in a manner consistent with the City's primary operational needs. In this regard, the City's Department of Information Technology and Telecommunications has worked, and continues to work, closely with the City's Department of Transportation and other relevant agencies to ensure that the supplemental use of these City poles as small cell locations does not conflict with, or burden, the original primary uses for these poles. It is important to note that the City's public safety and transportation agencies are looking increasingly toward the use of equipment on public rights-of-way to enhance and facilitate the security and ease of the public using those rights-of-way. The City's primary energy transmission provider, Con Edison, is proposing to install wireless meter reading facilities on many City poles, as part of an effort to add efficiency to the City's electrical grid usage and management. Such uses will place further demands on City pole usage and create additional need for the City to deal with the potential scarcity of poles available for wireless equipment use.

2. Visual impact and public design requirements for these highly visible locations sitting directly on the City's streets and sidewalks.

New York City's streets and sidewalks are among the busiest, most prominent and most visited in the world. The public design features of these streets are an important aspect of the City's management of its rights-of way. The City's Public Design Commission has jurisdiction over streetscape design review matters and has adopted detailed and specific design and size requirements for installations pursuant to the City's poletop franchises. Given the increasing demand for the placement of equipment in the City's public rights-of-way, the sensitivity and importance of a careful balancing of the operational needs of City agencies and franchisees and the visual impact of installations on the City-owned streets and sidewalks is growing. For the Commission to try to intervene on a national basis on an issue that is highly dependent on local conditions would be a major policy error. New York City's streetscape is a unique and precious resource. Preserving the City's authority to manage that resource, including the authority to determine the aesthetics and visual impact of the City's street light poles and traffic light poles, to the same degree a private owner may control aesthetic decisions regarding its own property, is of the utmost concern.

3. The City's limit of one wireless installation per pole has been essential to the implementation of the City's entire poletop franchise contract system.

In order to oversee the operation of its street lighting and traffic lighting operations, in a manner that can effectively and efficiently co-exist with wireless industry installations, the City must ensure that as operational issues arise affecting critical City traffic and lighting activities, responsibilities can be identified without dispute among multiple wireless equipment occupants. For example, if there appears to be an antenna malfunction affecting a traffic signal, the City needs to be able to identify immediately the source of the issue, without trying to determine which of multiple antenna providers on a pole is the source. In addition, the prospect of multiple competing entities engaged in maintenance of separate wireless facilities on traffic light and street light poles would increase the burden on the City, its contractors and suppliers to conduct their own operations to maintain traffic safety and street lighting. Furthermore, the City's streetscape design and sidewalk visual impact concerns are not currently compatible with multiple installations on a single pole. The City's poletop franchise system includes a methodology for allocating poles such that competing companies have access to numerous pole locations without the need for multiple equipment installations on a single pole. Absent the authority to limit occupancy to one equipment installation per pole, the City would not have permitted such occupation at all, and would not recommend that other local governments authorize such occupation if multiple equipment installations per pole are federally mandated merely because one installation has been permitted.[16] The City will continue to evaluate evolving technologies and operational methods, and if and when it becomes practicable to support more than one franchise installation per pole, given the City's particular operational and streetscape concerns, the City could certainly entertain proposals to do so, but until then enforcement of this requirement remains important. The limit of one equipment installation per pole does not exclude the possibility of multiple providers collocating within the single installation, and the City has accommodated such arrangements on many of its poles, and can continue to do so (provided such do not raise issues for the City's first responder and public safety agencies). But as demand for locations for many purposes increases, the need for careful local management of limited pole resources will increase, making nationwide mandates on these matters less and less practical.

4. Market-based compensation to City taxpayers for the private, profit-making occupation of City-owned property.

The City's franchise compensation terms for the poletop franchises arise generally from a form of hybrid competitive process, intended to generate a fair market rental value to the City. When the City first crafted its request for proposals for poletop wireless franchises, the City reviewed information regarding then-prevailing rental rates charged around the City by private landlords for rooftop occupation by wireless facilities (a competitive market that offers substitutable opportunities to poletop use for wireless). The City recognized that the poletop wireless facilities would offer less flexibility per installation than most rooftop installations, and therefore focused on the lower end of the rooftop market range as a minimum per pole

[16] The City's enforcement of its long-standing franchise contract requirement limiting wireless installations to one per pole, implemented in the City's property management role, not its zoning authority role over private property use, is consistent with 47 USC Section 1455(a) (Section 6409(a) of the Spectrum Act). See the Commission's determination at paragraph 239 of the 2014 Order: ". . . [W]e conclude that Section 6409(a) applies only to State and local governments in their role as land use regulators and does not apply to such entities acting in their proprietary capacities . . . . Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property and we find no basis for applying Section 6409(a) in those circumstances." The continuing operational and aesthetic relevance of this City requirement in this respect is an important reason that 2014 Order's conclusion should not be changed.

compensation rate. The City also set substantially lower minimums in areas of the City where historic telephone penetration rates were lower (which also reflected lower market rental values in such areas).

The City's franchise granting process was and remains non-exclusive (with, as noted, above, eight active franchises), such that a potential franchisee is not required to bid a per-pole compensation rent that would be the single highest among all bidders in order to gain exclusive access to the entire inventory of City poles. Instead, the City set minimum per-pole compensation rents for franchise proposals, and then asked proposers to bid higher if they wished to gain a higher priority in the subsequent selection of individual pole locations during the periodic selection processes. In effect, the City established a form of "draft pick selection" process for franchisees to select individual poles. Franchisees who bid, during the request for proposals process, and therefore now pay pursuant to their franchise contracts, a higher per-pole compensation rent, receive earlier opportunities to select a group of specific pole locations. The Notice observed that this approach to per-pole rental compensation has produced a "relatively low fee structure," consonant with the City's goal of encouraging a robust wireless infrastructure in New York City, while also assuring that City taxpayers receive a market-based compensation rent for the private, profit-making occupation of taxpayer-acquired and taxpayer-maintained property.

5. Structuring the franchise system to offer a selection of pole locations to multiple franchisees is another City priority reflected in the poletop franchise contracts.

As noted above, the City has established a process by which competing franchises have periodic opportunities to each select a limited group of new pole locations (in priority order based on the per-pole compensation each franchise offered, and now pays) during the applicable franchise request for proposals process. There is a profound difference, perhaps not fully distinguished in the Notice, between the flow of applications that may come in to a local zoning or land use board for a proposed wireless installation on private property, and the manner in which applications may come to a local government for wireless installations on poles in the streets. Zoning/land use review applications are inherently queued by the prerequisite of an agreement between a private property owner and a wireless facility provider, which then triggers any necessary application for a local land use review. In contrast, any wireless facilities provider, or any number of wireless providers, seeking to locate equipment on poles in the right-of-way could request, at any time, an unlimited number of requests for use of an unlimited number of poles, creating a potential "race to the window" in the event of some sort of mandatory deadline for review of applications to use local government-owned property. Each local community has a different number and arrangement of poles, and the appropriate method and timing for handling such requests, in an orderly manner that is consistent with the goals of enhancing wireless infrastructure, competition and other local priorities, is highly dependent on local conditions. It would be counter-productive to the Commission's goals to somehow attempt to create or apply uniform standards, requirements or deadlines for local governments to handle or evaluate requests for use of poles in the right-of-way.[17] The City's franchisees, as mentioned above, are provided access to new poles using a "draft pick selection" that has resulted in a low fee structure and significant infrastructure build out. It would be counter-productive for the Commission to

[17] The City's current franchise contracts are expected to expire in 2019. It is expected that the terms and conditions of contracts that would be applicable after that date may vary somewhat from the current terms and conditions, based on the ongoing experience and goals of the City and current and potential franchisees.

jeopardize a system that works well with new rules that, though well intentioned, could have serious unintended consequences.

It is crucial to note in this regard that when the City began to grant franchises for installation of wireless facilities on City poles, from the mid-1990s to the mid-2000s, the initial expectation was that with the large number of City poles across the City's five boroughs and the relatively limited number of franchisees and given the scope of their needs, such needs could be relatively well-accommodated without placing undue demands on the supply of available pole and right-of-way space. However, it is becoming increasingly clear, given growing interest from City agencies, energy transmission providers, and the wireless communications industry that new issues arising from a scarcely available space are on the horizon. The City will need to continue to evaluate how to deal with a situation in which there is simply not enough right-of-way space to accommodate all the needs of all potential providers. The Commission, and current federal communications law, is particularly ill-equipped to impose top-down, nationwide mandates as to how to deal with this sensitive issue. The TCA failed to deal with questions of scarcity of space for telecommunications facilities in local rights-of-way, seemingly assuming that there would always be plenty of space to accommodate the relatively small level of facilities-based competition that would arise. This failure seems to leave the Commission especially poorly positioned to start imposing rules on local governments who need to figure out how best to deal with complex tradeoffs among the operational, aesthetic and technological demands on their streets and sidewalks, tradeoffs that are extremely dependent on specific local conditions that vary widely between and among large and small cities, suburban communities and rural counties, towns and villages, as well as Native American tribal areas.

C. Avoiding Market Distortion

The City emphasizes that any action by the Commission in this proceeding that is applied to the use of local government property, such as the poles in New York City streets, that is also not similarly applied to private property that wireless facilities providers would seek to use, would represent a serious distortion, not a promotion of free market incentives, and would discourage, not encourage, technological innovation.

The City has been working with small wireless facilities providers, using a wide range of technologies, for the use of City poles as facilities locations, for more than twenty years. As early as the mid-1990s, the City was working with innovative private sector companies such as Metricom, Inc., with its early wireless Internet access system "Ricochet," and the FCC's pioneer preference licensee Omnipoint, to place early forms of small wireless facilities on City poles. The City's experience with these early innovators, and many others we have worked with over the years, has made clear the highly dynamic and flexible nature of wireless technology options. Providers have used and will continue to use a highly diverse and ever-changing variety of methods to offer wireless services. Providers face competitive pressure to innovate in order to develop systems and equipment that most efficiently use any potential available resources. However, if the Commission were to select one type of potential location, such as poles in public rights-of-way, and by regulatory fiat set prices, terms, or conditions on accessing such locations, without also applying the same standards to private property owners, the Commission would be tipping the market toward a particular type of wireless technology, and a particular type of location, as well reducing incentives to use such a resource most efficiently. It may be, for example, that the most efficient approach to future wireless broadband connectivity will not be via outdoor DAS or small cell facilities but rather through indoor installations of ever smaller, safer, more capacious and reliable equipment

that do not burden public spaces. But if the Commission intervenes by trying to impose a new federal regulatory scheme on local government's uses of its own property, the Commission risks discouraging innovation with respect to such future development and to over-use, to wastefully use, the one type of property with respect to which the Commission will have tried to regulate owner discretion.

To access private property for wireless systems, providers must negotiate market prices, terms and conditions with private property owners who are unfettered in their discretion regarding access to their properties. Providers are incentivized to develop and use the most efficient systems and technologies to minimize the need for such resources. If in contrast, local governments are limited from exercising the same scope of authority with respect to the sites they own and manage, as private property owners and managers do with respect to their sites, wireless entities will be artificially steered toward this particular resource, to use it inefficiently, and to reduce investment in technological innovation that use alternative sources. The City encourages the Commission not to try to impose limits on local government discretion with respect to the use of poles in public rights-of-way that it does not also impose on private property owners whose property wireless providers seek to access.

IV. Conclusion

The City has long demonstrated its deep support for the availability of reliable, competitive wireless communications services. It looks forward to continuing its efforts in that direction. The best way for the Commission to promote its own, similar goals is to avoid any attempt to impose mandates on local government administration of its own rights-of-way and other property with respect to wireless facilities siting. Absent new federal legislation, such mandates would be beyond the Commission's authority and would thus create nothing but confusion and uncertainty. And even if the Commission were to be granted such authority, such mandates would be counter-productive to the very goals the Commission seeks to advance. The City welcomes the opportunity to work with the Commission, with the wireless industry and with other jurisdictions to develop model procedures based on successful best practices that could be offered to local governments to apply when and where they are appropriate. But imposing new federal regulatory requirements on local government decision-making regarding wireless facilities siting on local government-owned streets, sidewalks and other property would be a legal and policy error.

Sincerely,

The City of New York

By: Bruce Regal, Senior Counsel, New York City Law Department